IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLALLAM COUNTY, WASHINGTON, WILLIAM A. NELSON, Sheriff of Clallam County, Washington, E. C. STEWART, Treasurer of Clallam County, Washington, and J. O. MORSE, Assessor of Clallam County, Washington, *Appellants,* vs. THE UNITED STATES OF AMERICA, and UNITED STATES SPRUCE PRODUCTION CORPORATION, a corporation, *Appellees.*	No. 3938

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

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STATEMENT

The appellees, on the 6th day of April, 1922, filed in the above District Court their complaint against the appellants.

The complaint seeks the cancellation and a permament injunction against the collection of certain state and county taxes levied by appellants, Clallam County and the County's taxing officers, upon certain lands and properties, title to and possession of which is and has been during the years for which such taxes have been levied, in the appellee, United States Spruce Production Corporation, and located in Clallam County, State of Washington.

The United States has been joined as a party plaintiff with the Spruce Corporation and the defendants are Clallam County and its taxing officers.

The complaint for cause of action alleges in substance as follows:

That the suit arises under the laws of the United States; that the United States Spruce Production Corporation, hereinafter called the Spruce Corporation, is a corporation organized and existing under the laws of the State of Washington, and a citizen of the said state; that it has been licensed and authorized to do business in said state and has in all respects complied with all the laws of said state entitling it to transact business in said state.

That it was so incorporated pursuant to certain war acts of Congress, especially the act of July 9, 1918, amending the act of April 11, 1918.

That the appellant, Clallam County is a municipal corporation of the State of Washington, and the other appellants, defendants in said action, are officers of said county.

That more than three thousand dollars is involved.

That certain war legislation and especially acts of Congress of June 3, 1916, March 4, 1917, July 24, 1917, authorized the President to acquire spruce and fir lumber and other commodities as war materials, and to manufacture the same for the use of the army

and navy. That these powers were exercised, and the War Department and the Chief Signal Officer made plans to produce such material and to build railroads, air craft machines, and factories therefor, and to do all things necessary thereto under an appropriation of Congress of six hundred forty million dollars.

That under the act of March 4, 1917, such powers could be exercised through any agency that the President might adopt.

That under the act of April 11, 1918, as amended by the act of July 9, 1918, the Secretary of War could condemn lands timber, saw mills, equipment, etc., for such purposes and could purchase or contract for use of the same.

That under said powers and for war purposes the construction of a logging railroad in Clallam County known as Spruce Production Railroad No. 1 was commenced and the properties in controversy in this suit were acquired.

That such construction and acquisition was first commenced and practically completed under a contract between the United States and the Siems-Carey-H. S. Kerbaugh Corporation.

That thereafter this contract and the railroad, mill and mill site, and other properties acquired by the United States under the contract, were transferred and conveyed by the United States to the ap-

pellee, Spruce Corporation, which corporation thereafter continued such construction of the railroad and mill and the acquisition of property.

That the United States selected the railroad route and the same was constructed, right-of-ways and other properties acquired for and belonged to the United States, although the title was transferred to the Spruce Corporation and is carried in its name for convenience.

A lengthy description of the railroad, mill site and the properties in question is set forth in the complaint.

That under the act of July 9, 1918, the Director of Air Craft Production was authorized in carrying it out to form corporations under the laws of the several states of the United States, and to exercise the powers conferred through the agency of such state corporations, the United States to own all or not less than a majority of the capital stock of such corporation.

The act gave authority to transfer and convey to such corporation any contracts held by the United States for air craft production and the title to lands and property acquired for such purpose.

In carrying out such authority the Director of Air Craft Production caused the appellee, Spruce Corporation, to be formed as a corporation under the laws of the State of Washington, the United States

owning and controlling all its capital stock; that such corporation is merely an arm, agency or instrumentality of the United States Government to carry out the purposes of said acts of Congress. That no one other than the United States has any ownership of or interest in the properties in controversy held by the Spruce Corporation or the stock of said corporation.

That the Board of Directors of the Spruce Corporation are named by the United States.

That the Siems-Carey-Kerbaugh contract, the railroad and all properties in controversy, were transferred and conveyed by the United States to the Spruce Corporation and title was acquired and possession held by such Spruce Corporation prior to 1919 and prior to the levy of the taxes sought to be avoided.

That the taxing officers of Clallam County did not list said properties for state and county taxes in the years 1919 and 1920, but in making up the tax roll for state and county taxes for the year 1921 said properties were assessed for taxes for the three years.

Statement of the assessed valuations for each of the three years in question of the different descriptions with the amount of the tax assessed for each year is set forth in the complaint. This shows an assessed valuation of over half a million. (Under the laws of the State of Washington the assessed

valuation is 50 per cent of the full value.) Taxes for the three years aggregated $80,525.79.

That the appellants threaten and will unless enjoined, enforce collection of said taxes.

That the property is not subject to state taxation for the reason that the property in fact belongs to the United States; that it is held by the Spruce Corporation merely as an agency of the United States for the purposes set forth in the complaint.

There is no claim of any invalidity or irregularity in the tax or want of power or misconduct of the taxing officers other than that the property is exempt as belonging to the United States.

The complaint further alleges that such tax is a cloud on the plaintiffs' title; that by reason of the assessment the appellants are claiming a lien and interest in the property adverse to the appellees and that this suit is to determine such interest, claim or lien. That the United States has expended through the agency of the Spruce Corporation more than a million dollars in building and acquiring the properties in question all of which it is claimed is held for government purposes and all is essential to a government enterprise.

That the threatened collection of said taxes would produce irreparable injury to the appellees and there is no available, speedy or adequate remedy at law.

The prayer is for a decree adjudging the taxes void, the property exempt and removal of the tax cloud, quieting title in appellees against the taxes and for a permanent injunction enjoining appellants from taxing the property or attempting to collect the tax, and for costs and general relief. (Record p. 2 and following.)

Appellants filed their answer to this complaint on the 21st day of April, 1922, and by their answer admitted the Acts of Congress and the purpose and construction of the same as alleged and claimed in the complaint, but by denials and affirmative defenses raised the following issues.

(1) That the United States District Court was without jurisdiction for the reason that the cause of action did not arise under the laws of the United States as no Federal question, constitutional question or construction of any law of the United States was involved; that the United States was neither a necessary or proper party plaintiff and the suit was one solely between citizens of the State of Washington.

(2) That the complaint did not state facts sufficient to constitute a cause of action in equity.

(3) That the property was located in Clallam County, State of Washington, and was owned and possessed by a citizen of the State of Washington, to-wit, the Spruce Corporation (the United States being a stockholder) and was subject to state, and county taxes as other property.

That the fact, if it were a fact, that the Spruce Corporation was an agency of the United States, could at most only prohibit the state and county from taxing its right to exist and carry on business, but not from taxing the physical properties belonging to such agency as other properties in the state were taxed.

(Record, p. 32 and following.)

TRIAL

At the opening of the trial and before any evidence was taken, defendants interposed objection to the jurisdiction of the court, and moved for a dismissal of the action on the following grounds:

(1) That the United States of America is neither a necessary nor a proper party to the suit.

(2) That the cause of action does not arise under the constitution or any law of the United States.

(3) That there is no disputed construction of the laws of the United States.

The court reserved its ruling on the motion and objections pending the taking of testimony.

(Record, p. 65-66.)

The following are substantially the facts in the case:

By reason of the world war, Congress of the United States as war measures enacted the various

statutes referred to in the complaint, giving powers and authority to the President of the United States, Secretary of War and the United States Officers in charge of preparations for and prosecution of the war as set forth in the complaint, empowering them to acquire and manufacture air crafts and do all things necessary to that end.

That in carrying out such powers the United States desired to acquire a large body of spruce timber in Clallam County, Washington, and to build and locate a railroad a distance of some thirty-six miles into the same and construct a mill to manufacture the same into air craft and to do whatever was necessary to that end.

The United States for this purpose entered into a contract with the Siems-Carey-H. S. Kerbaugh Corporation in order to acquire these properties and construct such railroad and continued to prosecute the same. On September 1, 1918, the United States had an investment in the same of $274,164.76 and outstanding obligations of $2,325,835.00 and three million of accrued charges for amortization already realized by the United States by including in the price of lumber sold and consumed (Ex. 22).

Congress had passed the act of July 9, 1918, which act authorized the Director of Air Craft Production when in his judgment air craft production would be so expedited, *to form corporations under the laws of the several states of the Union,* for the purpose of acquiring and manufacturing air craft

and the building of railroads in connection therewith. The capital stock and bonds and debentures of such corporation not to exceed one hundred million.

The United States might be a subscriber to the capital stock or purchaser of the same, or of such corporations' bonds and debentures, but at no time to hold less than a majority of the stock. The United States could sell such stock and bonds so subscribed for or purchased, but at no time to be a minority in stock voting power. That any appropriation for the purchase of air craft could be used for the purchase of such capital stock or bonds of such corporation; that enlisted men could be assigned to work for such corporations, but the corporation could employ "civilians in the manner customary in the conduct of ordinary business under corporate organizations." Authority is given by the act to transfer to such corporation "any interest of the United States in any existing contracts for air crafts * * * and the title to any lands, plants, railroads, or equipment or material therefor," on such terms as the Secretary of War may deem fit. That within one year after the treaty of peace "the Director of Air Craft Production shall, on behalf of the United States *as a stockholder*" institute proceedings to dissolve the corporation under state laws. On dissolution the assets are to be distributed *in accordance with the laws of the state under which the corporation was organized.*

There is no exemption or suggestion of exemption of the property of such corporation from state or county taxes.

Pursuant to said act, Col. Harris as legal adviser to Mr. Ryan, Director of Air Craft Production, on July 25, 1918, sugested the formation of a Spruce Corporation under the laws of the State of Washington, and suggested the sale of the property now under consideration in this suit to such "corporation directly for its capital stock." (Exhibit 16.)

After certain correspondence between Col. Disque and Mr. Ryan, the plan of forming the Spruce Corporation under the laws of Washington was determined upon. (Exhibits 17 and 18). The plan decided upon was to organize a state corporation with a capital of ten millions, sell the Siems-Carey-Kerbaugh contract and the properties and interest acquired by the United States thereunder, to the corporation at *net cost to the United States;* to call a one per cent payment on the subscribed capital stock, the corporation to isue its bonds or debentures, the same to be purchased by the United States and the Allied Governments, the United States to assign enlisted men to work for the corporation but the corporation to pay them the difference between army pay and current wages. (Exhibit 18).

On August 21, 1918, the Spruce Corporation was so formed under the laws of the State of Washington. The trustees were four civilians and three army officers. (Exhibit 1, Record p. 97).

The objects of the corporation were comprehensive, covering almost every business or activity permissable to a private business corporation, such as

to engage in the business of air craft production, timber and lumber production, milling, real estate, licenses and incorporeal rights, shipping, bond issue, its own stocks, stocks of other corporations, transportation, hotels, restaurants, places of amusement, docks, warehouses, elevators, terminal facilities, reservoirs, pipe lines, water systems, railroads of all kinds, telephone, telegraph and wireless plants, water, electric and light systems, "and in general to carry out a general manufacturing, selling, transportation, light and power business, and to do any and all acts which may be necessary, convenient or desirable for carrying out any of the corporate purposes herein set forth."

The capital stock was ten million dollars (100,000 shares at $100 each); time of existence was fifty years and place of business Vancouver, Clarke County, State of Washington. (Exhibit 1).

The first meeting of incorporators, stockholders, and trustees, was held on August 21, 1918. Stock was subscribed as follows:

United States.....99,993 shares,

and each of the seven trustees subscribed for one share.

The usual by-laws of private corporations were adopted, with the usual officers.

An agent for the State of Washington and one for the State of Oregon were appointed "upon whom

service of process can be made in behalf of the corporation."

A call for payment of one per cent of the subscribed stock was made.

The President of the corporation was authorized to acquire certain timber tracts at a price not greater than $635,000. (Exhibits 2, 3, 4, 5, 6, 7 and 8).

On October 10, 1918, pursuant to a resolution of the Board of Trustees, passed September 24, 1918, (Exhibit 12) the Spruce Corporation purchased and the United States transferred and conveyed to the Spruce Corporation the Siems-Carey-Kerbaugh contract, and all lands, railroads, mill, and property acquired under the contract, the same being principally the property involved in this suit. The conveyance was by deed reciting a valuable consideration, to-wit, *net cost* of the property to the United States. The deed recites that the United States does by these presents "bargain, sell, assign, transfer, convey and set over unto said United States Spruce Production Corporation, grantee, its successors and assigns, the following described property," being most of the property involved in this suit.

The habendum clause is "To HAVE AND TO HOLD all and singular the above described property, contracts, rights, and privileges unto said grantee, its successors and assigns forever."

The transfer is to be effective as of September 1, 1918, the United States "to receive and collect for

all shipments of lumber made prior to said date and the grantee to receive and collect for all shipments made on and after said date." (Exhibit 24).

At the meeting of the Trustees of the Spruce Corporation held September 24, 1918, a resolution to issue the corporation's participating debentures to the amount of ninety millions was passed. (Exhibit 12) (The Record, page 73, is incorrect in stating that these were *not* participating debentures. One of these debentures is Exhibit 15).

The plan was to sell these debentures to the United States and to the Allied Governments, but in fact only twenty-five million were issued and all purchased by the United States. (Exhibits 17, 18, 20, 21, 22) (Record, p. 79).

In payment for this twenty-five million dollars of debentures the United States paid to the Spruce Corporation fifteen million dollars in cash and applied the balance as a set-off against the value of the property which came into the Spruce Corporation from the United States through the transfer above mentioned. (Record, pp. 88 and 91).

On November 1, 1918, the Articles of Incorporation were amended by limiting the objects as follows:

"Article II

"The objects and purposes for which this corporation is formed are as follows:

"The purchase, production, manufacture, and

sale of air craft, air craft equipment or materials therefor, and to build, own and operate railroads in connection therewith, and in general to do all acts and things which may be incidental to the carrying out of the foregoing purposes or to the exercise of the foregoing powers or which may be necessary, advantageous, desirable, or convenient therefor." (Exhibit 10).

The corporation thereafter functioned, contracted, purchased and sold properties as any private business corporation, its business being conducted by its Board of Trustees and its officers elected by its board.

After the armistice, its activities have been principally directed to liquidating and closing its affairs.

At the time of the trial it had paid the United States on the twenty-five million debentures purchased by the United States, all but $5,338,667.09, in addition to which it had current indebtedness aggregating $28,482.47, and a stock liability of $100,000. (The amount actually paid in on stock subscriptions).

The Spruce Corporation then had assets of book value of $11,953,904.57. (Record, p. 93).

After the armistice the Spruce Corporation did such work as was necessary to preserve the property and in a measure complete it. It, however, also entered into a ten-year contract with the Puget Sound Mills and Timber Company. (Exhibit A). This contract is dated February 14, 1921, and provides for the use by the Timber Company of the Spruce Corpo-

ration's railroad for a period of ten years in hauling logs, estimated to be three hundred million feet, the Spruce Corporation to receive twenty cents per car per mile for both empty and loaded cars, and provides that in the event the railroad should become a common carrier, the tariff rates of the Washington Public Service Commission or the Interstate Commerce Commission should govern. (Exhibit A).

The Spruce Corporation also entered into other logging contracts after the armistice in which the corporation was to receive compensation. (Exhibits B and C; Record p. 80). It also entered into a contract with Clallam Lumber Company under date of August 25, 1920, by which the Lumber Company sold to the Spruce Corporation certain down timber for three dollars per thousand, the same to be paid for monthly as removed and at least one million feet to be removed each month. (Record p. 81). The Spruce Corporation, after a few months, sold this timber to Erickson for five dollars per thousand, except hemlock, which was sold at two dollars per thousand. (Record p. 82).

The railroad in question is thirty-six miles long, with a right-of-way 100 feet wide. (Record, 77-82).

The mill site covers approximately 100 acres and was planned for air craft manufacture, but by certain changes could be used to manufacture commercial lumber. (Record pp. 78, 83).

Each Trustee assigned his share of stock to the

United States in the form set forth on page 84 of the Record. This assignment was in fact an assignment of the Trustees' right to receive money and dividends on his stock.

The corporation at all times employed a large number of civilians in addition to the enlisted soldiers. (Record p. 97).

After the armistice the Spruce Corporation acquired further rights-of-way. (Record pp. 85-86).

The Spruce Corporation was duly "licensed and authorized to transact business in the State of Washington, and had in all respects complied with the laws of that state entitling it to transact business in that state." (Complaint Par. II, Record p. 3).

The Spruce Corporation was organized and created under the laws of the State of Washington and is a citizen of that state, (Complaint Par. I; Record p. 2) and has been conducted and operated as a private business corporation organized under the laws of the State of Washington.

The United States has never advanced to the corporation any money. It subscribed for 99,993 shares of stock, paid $100,000 on its subscription and purchased twenty-five million of the corporation's bonds, for all of which it paid in money and property, (Record pp. 88 and 91) and all of which have been repaid by the corporation except $5,338,667.09. The corporation owes current debts of $28,482.49 and has

assets of book value of approximately twelve million dollars. (Record pp. 92-93).

The sole interest of the United States in the Spruce Corporation is that of a stockholder owning all its capital stock, and the holder of its bonds to the amount of a little over five million dollars. The title to and possession of all the property assessed for state and county taxes and involved in this suit, during the period for which taxes have been assessed, has been in the Spruce Corporation, and was paid for from the proceeds of the sale of its debenture bonds.

There is no question of any invalidity or irregularity in the tax assessment sought to be enjoined, but the sole contention by plaintiffs is that the property is exempt from state taxes on the ground that it in fact belongs to the United States though possessed and title held by the Spruce Corporation.

At the close of the testimony, the defendants again objected to the jurisdiction of the Federal Court and moved a dismissal of the action on the following grounds:

(1) That the Court has no jurisdiction.

(2) That the United States is neither a necessary nor a proper party.

(3) That this cause of action does not arise under any law or the constitution of the United States, and the suit is between citizens of the same state.

Without waiving their objection to the jurisdiction, defendants further moved that this cause be dismissed on the ground that the complaint does not state facts sufficient to constitute a cause of action or to entitle complainants to the relief sought or any relief, and on the ground that the evidence introduced fails to show any cause of action and fails to show the plaintiffs entitled to the relief sought or to any relief whatever. (Record p. 105).

The case was then argued and taken by the Court under advisement.

The Court, on June 28, 1922, filed its memorandum decision to the effect that the property in question was exempt from state taxation, (Record p. 38 and following) and on August 18, 1922, signed and caused its decree to be entered, decreeing that the property attempted to be taxed was not subject to taxation, quieting the plaintiffs' title to the property against the taxes, removing the tax assessment as a cloud from plaintiff's title, perpetually enjoining the appellants from assessing or taxing the property and from attempting to collect the taxes in question, and with costs to the appellees. (Record pp. 47-48).

An exception to this decree was allowed the appellants.

Thereafter the appellants filed their assignment of errors and took the usual and necessary steps to appeal to this Court from said decree. (Record p. 49 and following).

ARGUMENT.

While appellants filed assignment of errors in much detail (Record p. 49), the points raised by the assignments and to which this discussion will be confined, are the following:

POINT I.

The United States District Court did not have jurisdiction of this suit.

POINT II.

The physical properties of the Spruce Corporation, under the facts of this case, were not exempt from the state and county taxes assessed by Clallam County and its taxing officers and sought by this suit to be enjoined.

POINT I.

THE FEDERAL COURT IS WITHOUT JURISDICTION.

The United States' interest in the Spruce Corporation is that of a stock and bond holder and it is neither a necessary or a proper party plaintiff to this suit.

Bank of U. S. v. Planters Bank of Georgia,
6 L. Ed. (U. S.) 244.

Judge Marshal in the above case says:

> "Many states of the Union which have an interest in banks are not sueable even in their own courts. * * * As a member of a corporation the government never exercises its sovereignty.

> It acts merely as a corporator and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporation act."

(That is, by the laws of the State of Washington.)

The above case also holds that suits by or against The Bank of the United States in which the United States owned stock, were not suits against the United States.

Hawes v. Oakland, 26 L. Ed. (U. S.) 827, holds that a stockholder cannot maintain an action without showing that he "has exhausted all means within his reach to obtain within the corporation its redress of his grievance." (P. 832).

To the same effect, *Euity Rule* No. 27.

Jellenik v. Mining Co., 44 L. Ed. (U. S.) 647, holds:

> "As the domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is whenever it is sought by suit to determine who is its real owner." (P. 651).

Barrow Steamship Co. v. Kane, 42 L. Ed. (U. S.) 964, holds:

> "There is a *conclusive* presumption of law that the persons composing the corporation are citizens of the same state with the corporation." (P. 966).

So, in the case at bar, the United States, a stockholder, is *conclusively* presumed for jurisdictional purposes, to be a citizen of the State of Washington.

Fitzgerald v. Mo. Pac. Ry. Co., 45 Fed. Rep., 812, holds a corporation is amenable to the laws of the state creating it. (P. 815).

> "The owner of all the stock and bonds of a corporation does not own the corporate property. The corporate property which includes all rights of action and claims for damages, belongs to the corporation and is subject to the management and control of its board of directors and if it be conceded that the defendant owns all the stock and bonds of the Denver Company, that fact gives it no title to or interest in the right-of-way or other property of that company, which it can make the basis of an action or plea in its own behalf." (Pp. 818-819).

This case also holds that in case of doubtful jurisdiction, jurisdiction should be refused.

In re Greenleaf, 56 N. E. (Ill.), 295, the court says:

> "That tangible property of the corporation and the shares of stock therein are separate and distinct kinds of property and belong to different owners—the first being the property of the artificial person, the corporation; the latter the property of the individual owner thereof,"

and holds that the shares of stock may be taxed in one jurisdiction and the physical property in another.

The Spruce Corporation is a separate entity and a citizen of the State of Washington. It is bound

by its contracts and is capable of suing and being sued. Its property can be subjected to execution. If its property is threatened by execution or wrongful seizure, the United States would have no standing to sue for injunction. The fact that the State or Clallam County are threatening to seize the property for taxes does not change the situation. It neither makes the United States a necessary or proper party nor involves the construction of any law of the United States.

See

U. S. v. Strang, 254 U. S. 491; 65 L. Ed. 368.
Sloan Ship Yards Corporation, Astoria Marine Iron Works v. U. S. Shipping Board Emergency Fleet Corp., and *Fleet Corporation v. Wood, Trustee in Bankruptcy,* 257 U. S. p.—; 66 L. Ed. (U. S.) p...

This Circuit, in the recent case of *U. S. v. Mathews,* (Fed. Rep. Adv. Sheets, Vol. 282, No. 1, Oct. 6, 1922, p. 266), would seem to settle this question so far as this Circuit is concerned. If, as decided in that case, the United States has not sufficient interest to maintain a suit to recover money paid out by the Fleet Corporation, it would seem that it could not join in a suit for the purpose of giving the Federal Court jurisdiction.

In the late case from the Third Circuit, of *Manufacturers L. & I. Co. v. United States S. B. E. Fleet Corporation* (Advance Sheets Federal Reporter, Vol.

284, page 231), the Court holds that a suit is maintainable against the Fleet Corporation; that it and not the United States is the real party defendant. The Court also holds (page 236) that the Fleet Corporation having requisitioned the fee of certain lands, that such lands "then belonged absolutely to the Fleet Corporation."

This cause does not arise under the laws of the United States in the sense that a Federal Court would have jurisdiction.

The constitution is in no way involved nor is a *construction* of any law of the United States involved. The Acts of Congress, pleaded in the complaint, their meaning and purposes as claimed, are not put in issue.

The sole question raised is one of fact as to the ownership of the properties taxed. There is no sound reason to have this question of fact presented to a Federal Court.

If a Federal Law is involved, it is only as it may tend to prove this fact of ownership. No disputed construction is involved.

The source of the money that bought the stock and bonds, the activities of the United States Officers, the activities of the Spruce Corporation, are all facts and involve no construction of Fedetral Law.

The trial court did not maintain jurisdiction on this ground, but solely on the ground that the United

States was a necessary and proper party. (Record, p. 40).

Blackburn v. Mining Co., 44 L. Ed. (U. S.) p. 276, holds that the application of the Federal statute must not only be involved "but that the controversy was determined by a *construction* put upon the statute adverse to the contention of one of the parties." (P. 283). That there must be a denial of right arising out of the construction of a Federal Statute.

To the same effect see

Shoshone Mining Co. v. Reutter, 44 L. Ed. (U. S.) 864;
Western Union Tel. Co. v. Ry. Co., 44 L. Ed. (U. S.) 1052;
Little York Gold W. W. Co. v. Keyes, 24 L. Ed. (U. S.) 656;
Bankers, etc., Co. v. Minneapolis, etc., R. Co., 48 L. Ed. (U. S.) 484.

In the *Fitzgerald* case, *supra* (45 Fed. Rep., 812) the court says (on page 819):

> "If there is no dispute between the parties as to the meaning of the Act of Congress, there is no Federal controversy between them and no cause for removal. The Supreme Court has settled the rule on this subject."

In the case of *Arkansas v. Choctaw, etc., R. Co.,* 134 Fed., 106, it is held that any doubt must be resolved against the jurisdiction and quotes from Judge Brewer as follows:

"When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a Federal question."

This Circuit has also held the same doctrine in the case of *Montana Ore Producing Company v. Boston, etc., Mining Co.,* 85 Fed., 867.

In the case of *Miller v. Illinois Central R. Co.,* 168 Fed., 982, on page 987, the court says:

"It does not appear that a construction of the act known as the 'Employers Liability Act' of Congress is in any way involved in this case. It seems to be a case where the decision will depend entirely upon the facts of the case as applied to the law. The mere application of an act of Congress to a case gives no right of removal."

The Spruce Corporation is a creature of the laws of the State of Washington—a citizen of that state. No constitutional question or construction of Federal law is involved. The United States is not a proper party plaintiff. On what principle can a Federal Court have jurisdiction?

In *Head & Armory v. The Provident Ins. Co.,* (2 Cranch, 127), Chief Justice Marshall said:

"A state corporation is a creature of state law. Its qualities and disabilities are 'what the incorporating act has made it—to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers.' "

In the *Dartmouth College* case (4 Wheaton, 636), it is said:

> "Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it."

In the *Dandridge* case (12 Wheaton, 64), it is said:

> "Corporations created by statute must depend both for their powers and the mode of exercising them upon the true construction of the statute itself."

In the *Earle* case (13 Peters, 519, opinion, 587), Chief Justice Taney said:

> "A state corporation can do no acts 'except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes.' "

And on page 588:

> "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplating of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

The effort of appellees to show in the case at bar that the Spruce Corporation was controlled and its business operated under United States officers and agents, and that the United States appointed its board of directors, was futile as the acts of this corporation must be done by its officers and agents and in the manner authorized and prescribed by the laws of Washington. The fact that it confined, if it did

confine, its activities to furthering the interests and purposes of its dominant stockholder, the United States, would not change the law; such acts are the acts of a creature of state law and are governed and limited by that law.

How is it permissable for this creature of state law, this citizen of the State of Washington, to be singled out from other citizens of Washington as a class by itself, and be allowed to present its controversies to a Federal Court?

Why should such a citizen be relieved from the obligations imposed by the same law on other citizens to support the state administration that gives its property protection?

The incorporation laws of the State of Washington are full and complete.

Remington's 1915 *Code,* Sec. 3677 and following.

Superior Courts of the State of Washington have jurisdiction of suits involving "title to real estate, or the legality of any tax."

Rem. 1915 *Code*, Sec. 15.

Suits to enjoin tax collection must allege and prove tender of taxes justly due.

Rem. Code, 1915, Sec. 955.

The State Board of Taxing Commissioners have

"general supervision of the system of taxation throughout the state," with very broad powers.

Rem. Code, 1915, Sec. 9084, and following.

All property in the State of Washington is subject to taxation.

Rem. Code, 1915, Sec. 9091.

Suits by a state corporation must allege and prove payment of last annual license fee to the State.

Rem. Code, 1915, Sec. 3715.

If the Spruce Corporation engages in hazardous work it is subject to the *State Workmen's Compensation Law,* and must pay the State a percentage of its pay roll.

Rem. Code, 1915, Sec. 6604 and following.

If it operates its railroad as a common carrier it is subject to and governed by the *Public Service Commission Law* of the State of Washington.

Rem. Code, 1915, Secs. 8626-1 and following.

In the recent case of *King County, State of Washington, et al, appellants, v. U. S. Shipping Board Emergency Fleet Corporation, appellee,* numbered in this Court 3851, and decided September 5, 1922, the jurisdiction was not raised, and the Fleet Corporation was not a citizen of the State of Washington.

POINT II.

THE PHYSICAL PROPERTIES OF THE SPRUCE CORPORATION ARE NOT EXEMPT FROM THE STATE AND COUNTY TAXES ASSESSED BY CLALLAM COUNTY AND ITS TAXING OFFICERS.

1. *Exemption from State taxation of a Federal Agency can only arise by necessary implication or by express Congressional declaration.*

Such necesary implication depends not upon the fact of the agency, but upon the character and *necessary effect* of the tax. From a tax which deprives the agent of the power to serve the Government, or directly and necessarily obstructs the exercise of that power, there is a necessary implication of exemption. From any other tax there is no such implication of exemption.

The tax upon the operation or right to function of the agent has the necessary effect of destroying or obstructing the power of the agent to serve, hence is impliedly prohibited. A tax upon the local property of the agent has no such necessary effect, hence is not impliedly prohibited and the exemption, if any, must arise from express Congressional declaration. This distinction runs through all the decisions.

McCulloch v. Maryland (4 Wheat., 316; 4 Law Ed., 579-600-609), is the leading case. It involved a stamp tax on notes issued by the Maryland branch of the old United States Bank, a corporation created by act of Congress. The Maryland law sought to pro-

hibit the issuance of such notes except upon stamps for which must be paid to the state a graduated tax according to the denomination of the notes, and to prohibit the isuance of such notes except in specified denominations, not prescribed by the act of Congress creating the bank. The Federal Supreme Court, speaking through Chief Justice Marshall, held in substance that this was an attempt to tax the operations of the bank and to control or impede its right to function, as a governmental agency, and that the Maryland law was therefore unconstitutional and void. In his final summary Chief Justice Marshall said:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

Osborn v. Bank of United States, 9 Wheat., 738-867; 6 Law Ed., 204-235, involved a law of the State of Ohio imposing upon each office of discount and deposit of the Bank of the United States within that state an annual occupation tax of $50,000. The Court, again speaking through Chief Justice Marshall, held in substance, that the capacity of discount and deposit were essential to the operation of the bank and that therefore the exemption from a state tax on these

operations, though not expressed by the act of Congress, was necessarily implied. Noticing the alleged resemblance between the bank and a governmental contractor, Chief Justice Marshall said:

> "Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed, or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control."

This language clearly recognizes the distinction upon which we insist, namely, between a tax upon the property of a governmental agent and a tax upon the action or right to function of such agent. This distinction, as said by Justice Strong in the *Peniston* case, "has ever since been recognized."

Thompson v. Union Pacific R. Co., 9 Wall., 579; 19 Law Ed., 792-798, was a suit to enjoin a state tax on the railroad's property. The railroad was incorporated by the Territorial Legislature and State Legislature of Kansas. Chief Justice Chase reviews prior decisions and finds in substance that exemption from state taxation of corporations employed as governmental agencies have been sustained in two classes of cases: (1) where the corporation was created under act of Congress and the tax was sought to be imposed on its operations or right to function, as in

McCulloch v. Maryland, and, (2) where the act under which the corporation was formed expressly exempted the corporation or its property from state taxation or limited such taxation, as in *Bradley v. People,* 4 Wall., 459; 18 L. Ed., 433. He says:

> "But we are not aware of any case in which the real estate, or other property of a corporation not organized under act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government."

He adds:

> "We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland,* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection.
>
> "We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within the constitutional sphere. We fully recognize the soundness of the doctrine, that no state has a 'right to tax the means employed by the Government of the Union for the execution of its powers.' But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.

"No one questions that the power to tax all property, business and persons, within their respective limits, is original in the states and has never ben surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection.

"*Lane County v. Oregon* (*ante,* 105);
"*Bank v. Kentucky* (*ante,* 701).

"We perceive no limits to the principle of exemption which complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the Government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments."

Union Pacific R. R. Co. v. Peniston, 18 Wall., 5-50: 21 Law Ed., 787-791, was also a suit to enjoin a state tax on the property of the railroad in the state. The railroad corporation was created by Congress, as an agent of the general government, design-

ed to be employed and actually employed in the service of the government, both military and postal. It was aided by a land grant and bonds advanced to it by the government, and the government expressly had the right to name five of its directors. The Court said:

> "That the taxing power of a state is one of the attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the Federal Government, *either expressly or by necessary implication,* are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax belonging to the states, we have declared that it is indispensable to their continued existence." (Italics ours.)

After reviewing the *Thompson* case the court said:

> "It may, therefore, be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such agent. A contrary doctrine would greatly embarass the states in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and is not only used, but is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad;

telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General Government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the states it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General Government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited."

Referring to *McCulloch v. Maryland* the Court said:

"The institution was prohibited from issuing notes at all except upon stamped paper furnished by the state, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in nature and its effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision."

The court thus makes plain the distinction upon which we insist here, namely, a tax on the operations

or right to function is prohibited by necessary implication; but a tax on the local property of the corporate agency is not prohibited by implication. It follows that such a tax can only be prohibited by express declaration of Congress. The court said:

> "This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized."

The court further said:

> "It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of the power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Justice Field dissented in this *Peniston case,* but in the next case which we shall notice he receded from his former position and said: "But on further consideration I have come to the conclusion that the rule laid down in the *Thompson case* is the true and sound rule."

County of Santa Clara v. Southern Pacific R. Co., 18 Fed., 385, involved county taxes levied upon the franchises and property of the defendant rail-

road corporations formed under the laws of the State of California. Two of these companies, with consent of the Legislature of California, were selected as special agents of the Federal Government and received grants of power and privileges from the Federal Government as postal and military roads, not possible under the original organization. They contended that the power to tax their franchises involved the power to destroy the companies and urged that the tax was therefore void.

The opinion was written by Justice Field. Following the rule in the *Thompson case* he said:

> "The state, it is conceded, cannot use its taxing power so as to defeat or burden the operation of the general government. And when the government has itself created the instrumentality used, its exemption from a state taxation necessarily follows. But we are of the opinion yielding to the decision cited, that when the instrumentality is the creation of the state,—a corporation formed under its laws,—and is employed or adopted by the general government for its convenience, although to enlarge its use and render it more available additional privileges and benefits are conferred by the government upon the corporation, it remains subject to the taxing power of the state, unless Congress declares it to be exempt from such power. Congress can undoubtedly exempt any agencies it may employ for services to the general government from such taxation as will in its judgment impede or prevent their performance. Occasions may arise hereafter, especially in time of war, where the necessities of the Federal Government will require such exemption of the roads of the companies, and of their franchises

> and appurtenances, to be declared and enforced; the exemption to continue until the necessities calling for it shall cease. But as yet Congress has not declared any such exemption either of their property or of their franchises, and we therefore think that none exists."

The above language is directly applicable here. The Spruce Corporation is organized under the laws of the State of Washington. Therefore, "it remains subject to the taxing power of the State, unless Congress declares it exempt from such power." This is especially true where, as here, the tax is purely a property tax and not a tax on the franchise.

Central Pacific Railroad Co. v. California, 162 U. S., 91-128; 40 Law Ed., 903-915, involved the validity of a tax on the railroad's franchise included in its return with its other property for taxation. The railroad company was organized under the laws of the State of California and derived its franchise from those laws. It appeared also that it had as an agency of the Federal Government an additional franchise from the Federal Government. It was contended that the whole tax was void in that it included a tax on the Federal franchise which was exempt from State taxation. The Court, speaking through Chief Justice Fuller, held that the State franchise was not exempt from taxation, and that in the absence of a showing to the contrary the franchise taxed was presumed to be that which the State could legally tax, namely, the State franchise and not the Federal franchise. The tax was held valid.

Choctaw, Oklahoma & Gulf R. Co. v. Mackey, (U. S. Supreme Court Adv. Opinions No. 16, July 1st, 1921, p. 639) is the most recent expression of the Supreme Court of the United States on this question of state taxation of property of Federal agencies. The railroad there in question served certain coal mines situated upon lands leased from the Choctaw Indians and it was conceded that the railroad was used by the Government as an agency in carrying out its policy toward the Indians. The Court, following the rule in the *Peniston* and other cases, held the state tax on the railroad's property valid. The Court said:

> "And even though it be granted that the Federal Government utilized the railroad as an instrument in working out its policy toward the Indians, the tax upon the railroad property would be none the less valid."

It is thus plain that the Supreme Court of the United States in its latest utterance has evinced no disposition to recede from the original distinction made in *McCulloch v. Maryland,* between a tax upon the operations of a government agency or its rights to function, and the tax upon the property of such an agency located within the taxing state, and still holds that the latter is not exempt from taxation in the absence of a specific declaration of Congress to that effect.

This distinction between taxation of the operations or right to function of the governmental agency and taxation of its local property is also clearly

recognized in the *Telegraph* cases which were cited by appellees in the trial court as showing that the "means" employed by the Federal Government cannot be taxed by the states.

Williams v. Talladega, 226 U. S. 404; 57 Law Ed. 275, involved a municipal license fee in the nature of an occupation tax of $100 per year upon the right of the Western Union Telegraph Company to transmit messages. In consideration of permission conferred by Act of Congress to construct and maintain its lines upon the military and post roads of the United States, the company was required as an instrumentality of the Federal Government to transmit messages for the government at reduced rates and give such messages priority over other business.

The license tax did not except from its operation such Federal business. The ordinance was held void as an attempt to tax the right of the company to function as a governmental agency. But the Court, speaking through Justice Day, after reviewing the prior telegraph cases, said:

> "These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the state incorporating the company, and that this permissive grant did not prevent the state from taxing the real or personal property belonging to the company within its borders, or

from imposing a license tax upon the right to do a local business within the state."

Western Union Tel. Co. v. Texas, 105 U. S., 530; 26 Law Ed., 1067, involved an occupation tax which imposed a specific tax on each message transmitted by the company. This was in addition to the usual taxes on the real and personal property of the company within the state. The Federal Supreme Court held that in transmitting messages from points within to points without the state the company was an instrument of interstate commerce, and that in transmitting messages for the Federal Government it was a government agency, and that therefore neither interstate messages nor messages for the government could be subjected to the occupation tax. But, referring to the Act of Congress giving to the company the right to use military and post roads, the Court said:

"The Western Union Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business. The precise question now presented is, whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States."

Western Union Tel. Co. v. Attorney General,

125 U. S., 530; 31 Law Ed., 790, likewise sustains our position that an exemption from state taxation of the *property* of a corporation employed as a governmental agency is never implied though such exemption is implied as to its operations or right to function. The Court said:

> "While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary for its support."

A clearer recognition of the distinction between taxation of the operations or right to function of a government agency and taxation of its local property, than that made in these telegraph cases can hardly be conceived. They all hold that the operations or right to function of the governmental agency are the means employed by the government, without which the agent cannot serve the government; that state taxation of such operations or rights has a direct and necessary tendency to obstruct or impair the agent's power to serve, hence it is prohibited by necessary implication, but that taxation of the local

property of the agency in the same manner as other property in the state, has no such necessary tendency, hence is not impliedly prohibited.

It is no answer to say, as was said by the trial court, that the properties of the Spruce Corporation are "the only means and instrumentality by which the purpose and employment could be carried out." Obviously the timber lands, mill and railroad of the Spruce Corporation are no more the "means" employed by the government for the production of airplanes, than were the local tracks and rights-of-way of the railroad in the *Thompson* and *Peniston* cases the "means" employed by the government in the transportation of troops, munitions and mails. Obviously the property here taxed was no more the "means" employed for the government's purpose than were the local poles, wires and real estate of the telegraph companies the means employed for the messages in the *Telegraph* cases.

Obviously, equal taxation of the property here involved with other like property in the State has no more direct or necessary tendency to obstruct or destroy the power of the Spruce Corporation to produce timber for airplanes than the tax on the railroad's tracks and rights-of-way, involved in the *Thompson, Peniston* and other railroad cases, had to obstruct or destroy the power of the railroads to carry government troops, war munitions or the mails. It is no more true that this corporation could not produce airplane lumber without its timber lands than it was that the railroads could carry govern-

ment troops, munitions and mails without their tracks and rights-of-way, or that the telegraph companies could transmit government messages without their poles and wires.

It is too plain for cavil that all these cases hold that the "means" employed by the government are the corporations themselves with their right to be, to operate and to function; that the direct and necessary effect of a state tax on any of these rights would be to obstruct or destroy the power to serve, hence it is impliedly prohibited, but a tax on the local property commensurate with other like property in the state has no such direct or necessary tendency, hence is not impliedly prohibited.

This is the criterion laid down by Chief Justice Marshall in *McCulloch v. Maryland* over a hundred years ago and consistently followed ever since in an unbroken line of decisions. Congress must be presumed to have known of these decisions and that the rule they announced had been followed for a century when it authorized the creation under the State law, and the employment of the Spruce Corporation as a governmental agency. Had it intended or desired to exempt the local property of that corporation from State taxation it must be assumed that in the act authorizing the employment of such agencies it would have so declared. It did not so declare and no implication of such an intention can be reasonably indulged.

In practically every case in which the Federal

Supreme Court has held that the "means" employed by the Federal Government are impliedly exempt from state taxation, *the term "means" is defined as the corporate agency itself, its right to operate, to function and to be.* In none of them is it used as including the local physical property of the agency. In every such case such local property is *expressly excluded* from that term.

In the trial court considerable stress was laid, both by counsel for appellees and the Court, on the often-quoted dictum of Chief Justice Marshall in *McCulloch v. Maryland* that "the power to tax involves the power to destroy." The answer is found in the opinion of Judge Field in *County of Santa Clara v. Southern Pacific R. Co.,* 18 Fed., 365, above cited. It is true that in that case the tax on the property of the railroad was held invalid, not on the ground of exemption, but for gross inequality as compared with the taxes on other property in the state, thus impinging the Fourteenth Amendment of the Federal Constitution. The court held that that amendment declaring that no state shall deny to any person within its jurisdiction the "equal protection of the laws" imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including the power of taxation. Judge Field said:

> "Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legis-

lation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminatory taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections, and revolutions, than any other cause in the world. It would, indeed, as counsel in the *San Mateo case* ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law, 'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can thus be ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

It is thus made plain that the Fourteenth Amendment constitutes an insuperable bulwark against destruction of a Federal Agency by taxation of its prop-

erty. By guaranteeing equality of taxation it makes it impossible for any state to destroy such an agency by taxing its property without at the same time destroying every other business enterprise in the state and thus destroying itself.

No such inequality is claimed in the case here. The property of the Spruce Corporation is taxed just as other property in the state is taxed.

It is certainly no more true that "the power to tax involves the power to destroy" a Federal agency, than it is that the power to prohibit state taxation involves the power to destroy the state. This is clearly pointed out in the *Thompson* and *Peniston* cases. In the *Peniston* case the Court said:

> "A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to government agents, and is not only used, but it is necessary for their agencies. * * * Were they exempt from liability to contribute to the revenue of the states it is manifest that the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General Government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of these powers, it has never been decided that state taxation of such property is impliedly prohibited."

It is the plain purport of these and many other decisions of the Federal Supreme Court that the intention to exercise a power fraught with such potential disaster to these states should never be implied ex-

cept where the implication is positively essential to the service of the government by its agents. It is equally plain that unless the line of implied exemption from taxation be drawn between taxation of the right of the agent to operate, to function, or to be, and taxation of its local property, where it has been consistently drawn by that Court for a century, there is no line. It is only safe and sane to continue to hold, as has been so long held, that if Congress intends to exempt such property from state taxation it must say so and when it has not so declared, no such exemption shall be implied.

We submit that unless the property here in question was actually the property of the United States and merely held in trust for the government by the Spruce Corporation, it was not exempt from State taxation.

2. *The property of the Spruce Corporation was not owned by nor held in trust for the United States.*

That all of this property during the years for which it was taxed stood in the name of the Spruce Corporation by deed absolute, without reservation, condition or defeasance of any kind is an undisputed fact. (Exhibit 24). That the Spruce Corporation actually paid the full consideration therefor from money realized on the sale of its own debenture bonds is also an undisputed fact. (Record, pp. 88 and 91). That the Spruce Corporation is a separate entity, not endowed with the sovereignty of the United States; that it is not the government nor a

part of the government of the United States, but is a private corporation and as such subject to suits both on contracts and tort, are things now conclusively established by decisions of the Federal Supreme Court, and must per force be admitted.

United States v. Strang, 254 U. S. 491; 65 L. Ed. 368;

Sloan Shipyards Corp. v. U. S. Shipping Board Em. F. Corp.; Astoria Marine Corp.; Fleet Corp. v. Wood, Trustee, 257 U. S. .... 66 L. Ed.....; No. 14 Adv. Op. U. S. Sup. Ct., July 1, 1922, p. 456;

Panama R. Co. v. Minnix, 282 Fed. Rep. Adv. Sheets, No. 1, p. 47;

United States v. Matthews, 282 Fed. Rep. Adv. Sheets No. 1, p. 266.

In the face of these admitted, undisputed and adjudicated facts the trial court said that "in the instant case the property is the property of the United States, held in the name of the corporation, and has not been used in other than for war purposes." (Record p. 44). This statement is the crux of the trial court's decision. If it is erroneous a reversal seems inevitable. Let us examine it in the light of the record.

The Spruce Corporation is a separate entity, a corporation organized under the laws of the State of Washington. The legal title of all of this property

at the time it was taxed and during the years for which it was taxed was in that corporation. If, as the court said, it was the property of the United States it must be because of some trust created either *expressly* or by operation of law.

It is elementary that the burden of proving a trust in lands contrary to the apparent legal title, rests upon him who asserts it. Broadly speaking, there are only three kinds of trusts known to the law. These are (a) express trusts, (b) constructive trusts, and (c) resulting or implied trusts.

> 3 *Pomeroy, Equity Jurisprudence,* (4th Ed.), Sec. 987.

(a) *Express trusts* are "those created by the contract of the parties and intentionally."

> *Farrell v. Mentzer,* 102 Wash., 629-632;
>
> 3 *Pomeroy, Equity Jurisprudence* (4th Ed.) Sec. 987.

It is the settled law of the State of Washington that "an express trust cannot be proven by parol testimony." It must be proved by written evidence.

> *Arnold v. Hall,* 72 Wash., 50-52;
> *Kalinowski v. McNeny,* 78 Wash., 681-684;
> *Croup v. DeMoss,* 78 Wash., 128-131-132;
> *Farrell v. Mentzer,* 102 Wash., 629-649-650.

The Federal Courts are of course bound by the construction put upon the laws of the State by the

Supreme Court of the State. This is as true in the attempt to assert a trust as in other cases.

Osterman v. Baldwin, 6 Wall., 116; 18 L. Ed., (U. S.) 730.

There is no written evidence in this case even tending to show that the property here in question is or ever was held by the Spruce Corporation in trust for the United States. The deed from the United States to the corporation is a deed absolutely without reservation, condition or defeasance. It does not mention any trust and the corporation is not even referred to as a trustee. There is no other writing declaring any trust. Even the parol evidence adduced by appellees themselves as to the consideration for the conveyance negatives any trust. The land was actually paid for by the corporation with the proceeds of the sale of debenture bonds of the corporation which were purchased by the United States, and which, so far as they remain unpaid, are still held by the United States. (Record pp. 88, 91-92).

Plainly there is no evidence in this case from which any court can find the existence of an *express trust* for any purpose.

(b) *Constructive trusts* are those raised by the doctrines of equity to effectuate justice "where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the holder of the legal title, and where there is no express or implied written or verbal declaration of the

trust." All constructive trusts "may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source."

3 *Pomeroy, Equity Jurisprudence,* (4th Ed.), Sec. 1044.

Manifestly there is no constructive trust in this case. It is not pretended that the Spruce Corporation acquired title to this property through any fraud or by breach of any duty which it owed to the United States.

(c) *Resulting trusts* are of two types:

First, those arising from gift by will or deed, with an intention *appearing from the face of the instrument* that the legal and beneficial estates are to be separated, but no valid or complete trust being declared, *and no consideration stated.*

3 *Pomeroy, Equity Jurisprudence,* (4th Ed.), Secs. 1033-1035.

Second, these trusts arising where the legal estate is conveyed to one person and the purchase price is paid either in whole or an aliquot part thereof by another.

3 *Pomeroy, Equity Jurisprudence,* (4th Ed.), Sec. 1037.

In each of these types "there is always the element, although it is an implied one, of an intention

to create a trust." The law raises the trust as a result of this implied intention.

> 3 *Pomeroy, Equity Jurisprudence,* (4th Ed.), Sec. 1031.
>
> *Farrell v. Mentzer,* 102 Wash., 620-632-633;
>
> *Croup v. DeMoss,* 78 Wash., 128-132-133.

There is no evidence in this case to sustain a resulting trust of the first type, namely, those arising by implication from the *terms of a gift* by will or deed. The deed in this case is absolute on its face, states a full consideration and contains no mention of a trust or anything from which a trust can be implied. In such a case no extrinsic evidence is ever admissible to raise a trust, in the absence of fraud or mistake.

> 3 *Pomeroy, Equity Jurisprudence,* (4th Ed.), Sec. 1036.

The record is equally devoid of sustaining evidence to create a resulting trust of the second type defined by Judge Pomeroy as above noted, namely, that resulting from the payment of the purchase price by one party, the title being taken in the name of another. As in other claims of trust, the burden of proving the trust is upon him who asserts it. Though a resulting trust of this second type may be proven by parol evidence the proof must be of the strongest character. The rule as to *quantum* of proof is thus stated by the same eminent authority:

> "Where the trust does not appear on the

face of the instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt."

3 *Pomeroy, Equity Juris.,* (4th Ed.) Sec. 1040.

See also

Denny v. Holden, 55 Wash., 22-23;

Croup v. DeMoss, 78 Wash., 128-132-133;

Sewell v. Sewell, 109 Wash., 252-255;

Sheehan v. Sullivan, (Cal.) 58 Pac., 543-544;

Barger v. Barger, (*Or.*) 47 Pac. 702-704;

Catoe v. Catoe, (S. C.) 10 S. E., 1078-1079;

Hatton v. Cunningham, (Ind.) 62 N. E., 644.

A legion of cases to the same effect might be cited but these should suffice.

Appellees not only failed to show that the United States paid the purchase price when this land was conveyed to the Spruce Corporation, but their evidence shows conclusively that the purchase price was paid by the corporation to the United States from the proceeds of the sale of the debenture bonds of the corporation. (Record pp. 88-91). The evidence, so far from establishing a resulting trust in favor of the United States, shows conclusively that the Spruce Corporation actually paid the full purchase price and that the United States by taking the debentures of the corporation which it still holds, became and is a mere creditor of the corporation.

True, the Spruce Corporation is a governmental agency, but that does not make its property the property of the government nor make the corporation a trustee for the government as to such property. True, also, the United States owns all of the stock of the Spruce Corporation, but that does not make the government the owner of the property of the corporation.

Fitzgerald v. Missouri Pac. R. Co., 45 Fed., 313.

In re Greenleaf, (Ill.) 56 N. E., 295.

The decision of the Federal Supreme Court in the *Sloan case,* holding that the Emergency Fleet Corporation is a separate entity from the United States, conclusively establishes our claim that the Spruce Corporation is a separate entity from the United States. If it is, then property which it holds under deed absolute, without reservation or condition, for which it paid full consideration, is the property of the corporation and not the property of the United States.

Appellees have signally failed to show a trust of any kind. There is no *express trust,* since the written evidence contains no declaration of trust. The deed to the corporation is absolute. Even the parol testimony negatives such a trust. There is no *constructive trust,* since there is no evidence or claim that the corporation acquired title to this property through fraud or breach of duty. There is no *resulting trust,* since the deed recites a consideration paid

by the corporation and the parol evidence shows conclusively that the consideration was actually paid in full by the corporation.

If there is any trust it must have arisen under some settled principle. Yet these are the only classes of trusts known to the law and the evidence here negatives every one of them. The courts cannot create some new species of trust in order to defeat a tax any more than for other purposes.

The further statement in the opinion of the trial court that this property "has not been used in other than for war purposes" is also contrary to the evidence.

Appellant's Exhibit A, (Record p. 80), is a contract between the Spruce Corporation and Puget Sound Mill & Timber Company, *dated February* 14, 1921, by which the Spruce Corporation for a stipulated consideration paid and to be paid, contracted the use of its railroad to the timber company *for a period of ten years from February* 14, 1921, for transporting three hundred million feet of timber belonging to the timber company.

This is a purely private use, commencing over two years after the armistice and to continue for ten years thereafter, created by contract of the corporation, enforceable under the laws of this State.

Appellant's Exhibit B, (Record p. 80), is a contract between the Spruce Corporation and C. J.

Erickson, dated *February* 21, 1919, by which for a named consideration the Spruce Corporation sold certain timber to Erickson with the right to use a part of its railroad to transport not only this timber, but also logs purchased by Erickson from others, and for hauling supplies for other private persons, *for a period of one year from February* 21, 1919. In this contract, (sub-section 6), Erickson agreed to transport supplies for the United tates Forest Service, and to charge twenty cents per car mile. In such service Erickson was given the right to connect the Spruce Corporation's railroad with the Seattle, Port Angeles & Western Railroad, (sub-section 8), and Erickson was to have the joint use of the Spruce Corporation's telephone system.

Appellant's Exhibit C, (Record p. 80), is a contract between the same parties supplementing the above contract, Exhibit B. It is dated July 30, 1920, extends the contract, Exhibit B, to *January* 1, 1921, and provides for the purchase by Erickson of other timber from the Spruce Corporation and for the use of its railroad in transporting the same until January 1, 1921. In this contract (sub-section 9) the Spruce Corporation agrees to move cars for Erickson for twenty cents per car mile, and to pay him demurrage on certain contingencies.

In the latter part of 1920, the Spruce Corporation purchased from the Clallam Lumber Company some six million feet of timber, paying $3.00 per thousand, except for the hemlock, which sold for $2.00 per thousand. (Record pp. 81-82).

All of these contracts evidence purely private dealings and purely private uses of the railroad for periods of from one to ten years, and were made in 1919, 1920 and 1921, the same years for which the taxes in controversy were levied by Clallam County. They were made by a corporation organized under the State law, and created private rights enforceable under the State laws in property protected by the State laws. Moreover, it was admitted by counsel in the trial court when the decree was signed, that since the trial the taxed property had been sold by the Spruce Corporation on a long-time conditional sale contract, the title to remain in the corporation until fully paid for. While this is not in the record the fact will not be denied.

If the Spruce Corporation can deal with this property and enter it in the field of private use, as the contracts in the record show it has, and still have it exempt from State taxes, then we submit that with equal reason the property, even after such conditional sale, will still be exempt from State taxation.

The trial court seems to have proceeded upon the theory that because the United States owned all the stock of this corporation and because such ownership of stock carried with it the election and control of the managing directorate of the corporation, therefore the property of the corporation was the property of the United States. (See Opinion, Record p. 43.)

This is palpable non-sequence. Ownership of

capital stock does not carry ownership of corporate property.

Fitzgerald v. Missouri Pac. R. Co., 45 Fed., 313.

In re Greenleaf, (Ill.) 56 N. E., 295.

The trial court has cited two cases in this connection.

The first of these, *Chicago, Mil. & St. P. Ry. Co. v. Minn. C. & C. Association,* 247 U. S., 490; 62 L. Ed., 1229, was a proceeding before the Railroad & Warehouse Commission of Minnesota, involving switching charges imposed by two railroad systems through the scheme of incorporating a terminal corporation, the two railroads owning all the stock. The court held that this scheme could not be permitted to become the warrant for an increased charge to the shipper without any increase of the service; that for rate making purposes the two railroads should treat all shippers alike whether the shipments were delivered by these railroads over their own tracts or over the tracks of the terminal company. The decision does not touch the power of a sovereign state to tax property situated in the state and belonging to a citizen of the state. It is a freight rate case pure and simple.

The other case, *Cleveland-Cliffs Iron Co. v. Arctic Iron Co.,* 261 Fed., 15, holds that where two common owners of real estate created a holding corporation with equal division of stock and directors be-

tween them, neither party is entitled to obtain an advantage over the other by reason of the corporation form adopted, and that a court of equity may determine the matter with reference only to their individual rights. The question of ownership for taxation was not involved nor mentioned.

It is, of course, true that "courts will not be blinded by form of law," but will look through corporate form to attain justice or prevent fraud, but there is no fraud or injustice in the tax here involved; it is not claimed that it is unequal with other taxes, or that it is excessive in rate, or that it is based upon an excessive valuation, or that it is inherently unjust for any other reason. It is an equal tax upon the property within the State, protected by the laws of the State just as other like property is protected. There is no inherent injustice in this property bearing its equal proportion of the taxes levied for the protection of all property within the State.

That it was never the intention of Congress that the property vested in this corporation should be the property of the United States, is conclusively shown by the act of Congress authorizing the creation of the corporation. That act in terms contemplated that private persons might acquire and own as much as forty-nine per cent of the capital stock of the corporation. Congress was thus plainly of the opinion that the power to select and control the managing directorate of the corporation which would follow from the ownership of a majority of the capital stock as completely as from the ownership of all, was an

ample guaranty that this property would be used by the corporation for the desired purpose of producing airplane timber, without any declaration of any trust for or retention of any ownership by the United States in the property itself.

Suppose that private persons had acquired (as they might have done under the Act of Congress) 49 per cent, or any other part, of the capital stock of the corporation. Would anyone then have claimed that the property of the corporation was the property of the United States held in trust for the United States, either in whole or in part? Would anyone then have claimed that a part of this property, proportioned to the capital stock held by the United States, exempt from State taxation, and that the balance was not? We apprehend that no one would have seriously advanced either of these views.

Again, as we have pointed out, the very manner in which the operations of this corporation were financed, is conclusive evidence that the ownership of the property was not intended to be retained by the United States nor held in trust for the United States. It was financed and the very property here in question was purchased with the proceeds of the sale to the government of bonds of the corporation, which, so far as they have not been paid, are still held by the government.

These things are not mere matters of corporate form but are matters of substance going to show the intention of Congress in enacting the law authoriz-

ing the formation of this corporation under the laws of the State of Washington.

Let us examine a few of the provisions of that act:

By Section 1 it is left to the director of aircraft to choose the state under the laws of which the corporation was to be formed and no restriction is placed upon his powers in that regard except the total investment shall not exceed $100,000,000.

By Section 2 that officer is given permission to subscribe on behalf of the United States for the capital stock of the corporation and no restriction is placed upon the nature or extent of the liability so assumed. In the same section he is authorized to buy such evidences of indebtedness as the corporation may offer for sale. He may sell the interest of the United States in the corporation, either all or in part, the only restriction being that the United States shall not be made a minority stockholder.

By Section 3 it is provided that one year after the signing of peace the Director of Aircraft shall, "on behalf of the United States as a stockholder," institute proceedings in the proper State Court to dissolve the corporation and upon such dissolution the corporation "shall be liquidated and the assets distributed in accordance with the laws" of the State. This provision is without any restriction.

These provisions make it too plain for doubt

that the United States assumed the status of, and intended to exercise, and can only exercise in this corporation, the powers and rights of a *stockholder*. If the Federal Government had intended to exercise the sovereign governmental control over this corporation which it exercises over its boards and departments, why the provision that it should always retain a controlling interest in the voting power of the corporation? If the Government had intended to retain the ownership of the property vested in this corporation, why the provision that on its dissolution the assets be distributed by the Court of the State in accordance with the laws of the State? If it ever intended that this corporation should hold its properties merely in trust for the Government, why the *inconsistent* provision that private persons might acquire and own as much as forty-nine per cent of the capital stock?

Section 4 of the Act, touching the personnel of the officers of the corporation, expressly provides that the corporation may employ "civilians in the manner customary in the conduct of ordinary business under corporate organization." This further manifests a plain intent that this corporation shall operate as a mere private corporation under the laws of the State.

Section 5 expressly authorizes the Director of Aircraft to transfer to the corporation any interest of the United States in any contracts necessary for carrying out the corporate business and that he may transfer by appropriate instrument "the title to any

lands, plants, railroads or equipment used in or in connection with the production of aircraft, aircraft equipment or materials therefor."

If it had been intended that the Government should retain the ownership of such contracts and property and that the corporation should take and hold them as a mere trustee, what easier or more natural than to say so in the act authorizing the transfer? These properties were actually transferred to the corporation by deed absolute, without reservation, condition or declaration of any trust, an instrument of that officer's own selection. Thus in carrying out the legislation which the War Department had doubtless inspired and intrusted to its Director of Aircraft for carrying out, he construed it as contemplating no reservation of ownership in, or trust for, the United States. Such a contemporaneous construction by the officer intrusted by the statute itself with the carrying out of its own provisions is entitled to the greatest weight and will be followed by the courts unless there are the most cogent reasons to the contrary.

United States v. Moore, 95 U. S., 760; 24 L. Ed., 588;

Brown v. United States, 113 U. S., 568; 28 L. Ed., 1079;

Eells v. Ross, (9th Circuit) 64 Fed., 417-420;

Jacobs v. Prichard, 223 U. S., 200-214; 56 L. Ed., 405-409.

The case of *King County, Washington, v. The U. S. Shipping Board Emergency Fleet Corporation,* decided by this Court on September 5, 1922, will no doubt be cited by opposing counsel as decisive of this case. But there are certain considerations which vitally distinguish that case from this.

In the first place, the property there in question was not acquired by the Fleet Corporation with funds coming from the sale of its own bonds or debentures, nor even, as the Court in substance says, from the sale of its capital stock. It was purchased with money directly appropriated by the government for that purpose, the naked title being taken in the name of the Fleet Corporation. This is apparently the controlling factor in that decision. Whereas in this case the property was purchased from the United States by the Spruce Corporation and the government actually took in payment therefor the debenture bonds of the Spruce Corporation in the full value of the property, which bonds, so far as they have not been paid by the corporation, are still held by the government. The government thus became a mere creditor of the corporation, not the owner of the corporate property.

In the second place, the Fleet Corporation was organized under the laws of the District of Columbia, which were enacted by Congress itself. Whereas the Spruce Corporation was organized under the laws of the State of Washington. It may be, as said in the *King County case,* that it is one thing for the government to commit to its agent the control of public

property and authorize it to contract and to sue and be sued in relation thereto, "but quite another thing to permit such property to be encumbered with burdens in the imposition of which neither it nor its agent has any part." That language may have persuasive force as applied to the Fleet Corporation, but hardly as applied to the Spruce Corporation. The government, by organization of the Spruce Corporation under the laws of the State of Washington, did have just that part in imposing upon the local property of the corporation the same burdens which the laws of that state place upon other like corporate property. By causing the Spruce Corporation to be organized under the laws of the state it made that corporation a creation of the state deriving its franchise and its right to be from the state law and as a corallary subjected its property to the same burdens of taxation as other like corporate property in the state. As said in the case of *Thompson v. Union Pac. R. Co., supra*s

> "But we are not aware of any case in which the real estate, or other property of a corporation not organized under act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government."

Further in the same case it is said:

> "We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland,* beyond

its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and hold its property within state jurisdiction and under state protection."

As said in *County of Santa Clara v. So. Pac. R. Co., supra,* after citing the *Thompson case*:

"But we are of the opinion, yielding to the decision cited, that when the instrumentality is the creation of the state—a corporation formed under its laws—and is employed or adopted by the general government for its convenience, although to enlarge its use and render it more available, additional privileges and benefits are conferred by the government upon the corporation, it remains subject to the taxing power of the state, unless Congress declares it to be exempt from such power."

See also to same effect:

Western Union Tel. Co. v. Attorney Gen., 125 U. S., 530; 31 Law Ed., 790;

Williams v. Talladega, 226 U. S., 404; 57 L. Ed., 275.

Congress, when it passed the act authorizing the organization of corporations under state laws, must be presumed to have known of these decisions of the Federal Supreme Court. If it had intended that such corporation should be wholly exempt from state taxation it would have so declared.

In the third place, the provisions of Section 4 of the Act of June 5, 1920, touching the Fleet Corporation, which the court in the *King County case* con-

strued as giving to the government an "unqualified right to dispose of property, without any action on the part of the corporation, and to transfer it to the Shipping Board," has no counterpart so far as can be found in the legislation touching the Spruce Corporation. There is nothing in the legislation touching the Spruce Corporation evidencing an intention on the part of the government to retain any control over the property vested in that corporation other than what it might exercise as a majority stockholder. Even on a dissolution of the corporation any residue of the property remaining undisposed of by the corporation can pass to the United States only as a stockholder by order of the state court in a proceeding instituted pursuant to state law. This is specifically provided in Section 3 of the Act.

May we respectfully point out to this Court that, insofar as the decision in the case of *King County, Wash., v. U. S. Shipping Board E. F. Corp.* is based upon the theory that the states are without power to levy any tax upon the property of a corporation employed as a governmental agency without permissive legislation of Congress so to do, *it is directly contrary to a line of decisions of the Federal Supreme Court extending back for a century,* including the *McCulloch case,* the *Thompson case,* the *Peniston case,* the *Telegraph cases* and many other cases which we have cited and quoted elsewhere in this brief?

It is said in the *Thompson case,* 9 Wall., 579-592; 19 Law Ed., 792-798:

"No one questions that the power to tax all property, business and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection."

It is said in the *Peniston case*, 18 Wall., 5-50; 21 Law Ed., 787-791:

"That the taxing power of the state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United tates, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal Government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that before the adoption of the Constitution of the United States, each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls, or duties on internal production, manufacture or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on im-

ports or exports, except that may be absolutely necessary for executing the State's inspection laws."

In your opinion in the *King County case* you quote from the opinion in *Owensboro National Bank v. Owensboro,* 173 U. S., 664-668; 43 L. Ed., 850, as follows:

> "It follows then necessarily from these conclusions, that the respective states would be wholly without power to levy any tax, direct or indirect, upon national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

That this language, if given the meaning accorded to it by this Court, expresses the direct converse of the rule as expressed in the above quotations from the *Thompson* and *Peniston* cases, is self-evident. That the true rule is that expressed in those cases is also self-evident when it is remembered that the powers of the states are *original* powers and the powers of the Federal Government are *granted* powers.

Moreover, the above language quoted from the *Owensboro case* was used in relation to national banks and the governing statute (U. S. Rev. Stat., Sec. 5219) expressly says:

> "Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

This language of the statute is in no sense a

permission to tax. Plainly no such permission was necessary. On the contrary, it was a mere disclaimer on the part of Congress of any intention to *prohibit* state taxation of real estate belonging to national banks, which is a very different thing. If express permission were necessary, why any necessity to disclaim an intention to prohibit? The statute thus clearly defining its own meaning it is manifest that if the above quoted language from the *Owensboro case* was intended to apply to real estate it was wholly unnecessary to the decision and hence *obiter dictum.* If, however, it was intended to apply only to the *franchises* of national banks, (and we think a reading of the opinion will show it was so intended) then it is sound, since the exemption of the corporate *franchises,* the right to function and to be, of a governmental agency is necessarily implied as an incident to the granted powers of the Federal Government.

We respectfully submit that the trial court erred in entertaining jurisdiction of this case, and if not in error in that regard, then it erred in not dismissing this case on the merits.

Respectfully submitted,

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